JOINT APPENDIX.

APPENDIX A.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 28, 1979.

Before

HON. ROBERT A. SPRECHER, *Circuit Judge*
HON. PHILIP W. TONE, *Circuit Judge*
HON. HARLINGTON WOOD, JR., *Circuit Judge*

ROSEMARY AUGUST,
Plaintiff-Appellee,
No. 78-2312 *vs.*
DELTA AIR LINES, INC.,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 77 C 95
Julius J. Hoffman, *Judge.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by counsel for the defendant-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX B.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 78-2312

ROSEMARY AUGUST,

Plaintiff-Appellee,

vs.

DELTA AIR LINES, INC.,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 77 C 95—JULIUS J. HOFFMAN, *Judge*

ARGUED FEBRUARY 20, 1979—DECIDED JULY 6, 1979

Before SPRECHER, TONE and WOOD, *Circuit Judges.*

WOOD, *Circuit Judge.* The issue presented in this appeal is whether the awarding of costs under Rule 68 of the Federal Rules of Civil Procedure is mandatory or discretionary if the final judgment obtained by plaintiff is not more favorable than the defendant's offer. In January 1977 the plaintiff-appellee Rosemary August, after receipt of a right to sue letter from the Equal Employment Opportunity Commission, initiated an action against the defendant-appellant Delta Air Lines, Inc., alleging, *inter alia*, that she was discharged from her position as flight attendant solely because she was black. The plaintiff sought reinstatement, back pay, benefits, other equitable relief, and

attorneys' fees and costs pursuant to Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.*

On May 12, 1977, after discovery had commenced, the defendant made an offer of judgment to plaintiff in the amount of $450, including costs and attorneys' fees accrued to date, pursuant to Rule 68 of the Federal Rules of Civil Procedure.[1] Plaintiff rejected the offer.

After an extended 25-day bench trial on the discrimination charge, the district court held that although the plaintiff had produced some evidence tending to show racial discrimination, she had failed to carry the burden of proving racial discrimination in accordance with *International Brotherhood of Teamsters* v. *United States*, 431 U. S. 324 (1977) and *McDonnell*

1. Rule 68 provides:

> At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

Douglas Corp. v. Green, 411 U. S. 792 (1973).[2] Accordingly, the trial judge entered judgment in favor of the defendant and ordered each party to bear its own costs of litigation.

Pursuant to Rule 68 of the defendant then filed a motion for costs incurred after the date of the Rule 68 offer. The motion was denied.[3] We affirm and add only a few comments in

2. This court has affirmed the district court on the merits of the Title VII claim by a separate order issued this date pursuant to Circuit Rule 35.

3. In denying the motion, Senior District Court Judge Hoffman explained:

> While there is little authority on the point, this court is satisfied that in order to be effective, a Rule 68 offer must be made in a good faith attempt to settle the parties' litigation and, thus, must be at least arguably reasonable. . . .
>
> If the purpose of the rule is to encourage settlement, it is impossible for this court to concede that this purpose can be furthered or aided by an offer that is not at least arguably reasonable.
>
> At the time this offer of $450 was made this litigation was approximately four months old. While the offer was intended to be received in full settlement of the parties' dispute, it is unlikely that such a small sum of money would even have fully satisfied the plaintiff's then incurred costs in attorneys fees.
>
> It must also be remembered that the plaintiff was given some encouragement as to the merit of her claim from the findings of the Equal Employment Opportunity Commission. Additionally, a successful litigant in a Title VII case is as a general rule entitled not only to reinstatement, but also to back pay plus costs and attorneys fees.
>
> Finally, while the court did ultimately find itself constrained to enter its judgment for the defendant, the court certainly did not find the plaintiff's claim to be wholly specious. In the opinion of this court and in the particular facts and circumstances of this case, an offer of only the sum of $450 could only have been effective were the plaintiff's claim totally lacking in merit or were there present additional factors which would mitigate in favor of the defendant.

(Footnote continued on next page.)

support of Judge Hoffman's holding. At the time the order was timely tendered, the plaintiff's alleged actual damages from the loss of her employment for the preceding 19 months exceeded $20,000, not including attorneys' fees and costs. Plaintiff also anticipated possible reinstatement as a flight attendant. Although plaintiff did not succeed in her discrimination claim, it was not frivolous. Plaintiff presented some evidence suggesting racial bias. The trial judge found that plaintiff, although guilty of poor and unacceptable performance, rendered good service on occasion. Her file revealed a record of some company awards and compliments from co-workers and passengers.

Against the general background, the Rule 68 offer of judgment of less than $500 before trial is not of such significance in the context of this case to justify serious consideration by the plaintiff. At oral argument the defendant urged that even an offer of $10 would have met the requirements of Rule 68 and served the purpose of shifting cost liability. If that were so, a minimal Rule 68 offer made in bad faith could become a routine practice by defendants seeking cheap insurance against costs. The useful vitality of Rule 68 would be damaged.[4] Unrealistic use of the rule would not encourage settlements, avoid protracted litigation or relieve courts of vexatious litigation.

(Footnote continued from preceding page.)

> For the reasons I have stated, the court concludes that the defendant's Rule 68 offer of May 12, 1977 did not constitute an effective offer.

4. The concept originated in state practice and was novel to the federal courts when the federal rules were adopted in 1938. C. Wright & A. Miller, *Federal Practice and Procedure*: Civil § 3001 (1973). The general principle was enunciated in *Crutcher v. Joyce*, 146 F. 2d 518, 520 (10th Cir. 1945), where the Tenth Circuit, sitting as an equity court and without referring to the rule, held that a plaintiff may be denied costs when he sues vexatiously after refusing an offer of settlement and then recovers practically the same sum previously offered. At least in cases such as that, Rule 68 provides a just and fair procedure to all concerned parties.

The defendant's arguments to the contrary that the allowance of costs is automatic and non-discretionary evidences that the issue is not free from doubt. The defendant points to the language of the rule where there is no specific requirement that the offer be "reasonable" or in "good faith." If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree "must" pay the costs incurred after the making of the offer. Fed. R. Civ. P. 68. The defendant contends that it is entitled to the benefit of the rule if the technical requisites of the rule have been observed.

The defendant claims that unless Rule 68 is rigidly followed the rule will overlap the trial judge's express discretion under Rule 54(d), which provides costs to the prevailing party unless the court directs otherwise. In spite of the force of these arguments, we are not persuaded.

Title VII embodies a basic national policy given a high priority by Congress and contains an authorization for the award of attorney's fees intended to encourage aggrieved individuals to seek redress for violations of their civil rights. *Christiansburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412 (1978); *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968). In considering the counsel fee provision under Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(b), similar to the present provision of Title VII, 42 U.S.C. § 2000e-5(k), the Supreme Court in *Newman v. Piggie Park Enterprises, Inc.*, explained that the counsel fee provision was "to encourage individuals injured by racial discrimination to seek judicial relief . . . ." 390 U.S. at 402. We do not propose to permit a technical interpretation of a procedural rule to chill the pursuit of that high objective.

The other cases which have considered this Rule 68 issue are limited. Defendant relies on *Mr. Hanger, Inc. v. Cut Rate Plastic Hangers, Inc.*, 63 F.R.D. 607 (E.D.N.Y. 1974), and *Dual v. Cleland*, 79 F.R.D. 696 (D.D.C. 1978). In *Mr. Hanger* the plaintiff was unsuccessful in a patent infringement

suit and was assessed with the defendant's defense costs. There the plaintiff argued that the Rule 68 offer was a "tactical sham," unreasonable and in bad faith. Although the court considered Rule 68 as mandatory, the district court nevertheless pointed out that the offer afforded the plaintiff substantially all the relief prayed for in the complaint and was not a sham.

In *Dual* the district court in a Title VII case ruled in favor of defendants after a trial on the merits. The court considered the application of Rule 54(d), which specifically provides for the exercise of discretion, and Rule 68, which does not. Viewing the rule as automatic, the district court allowed costs to the defendant under Rule 68 but not under Rule 54(d). The issues of reasonableness and good faith apparently were not raised in *Dual* although the court noted that the plaintiff, albeit unsuccessful, had a good faith claim.

The plaintiff argues that her position is supported by *Perkins v. New Orleans Athletic Club*, 429 F. Supp. 661 (E.D. La. 1976), and *Hanna v. Crescent Ford Truck Sales, Inc.*, 404 F. Supp. 301 (E.D. La. 1975), but that support is at best only inferential.

For the considerations stated above, we believe that a liberal, not a technical, reading of Rule 68 is justified, at least in a Title VII case. We need not decide whether this same approach should be taken in other kinds of cases. In a Title VII case the trial judge may exercise his discretion and allow costs under Rule 68 when, viewed as of the time of the offer along with consideration of the final outcome of the case, the offer can be seen to have been made in good faith and to have had some reasonable relationship in amount to the issues, litigation risks and expenses anticipated and involved in the case.

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX C.

[1] IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

ROSEMARY AUGUST, *Plaintiff,*
vs. No. 77 C 95
DELTA AIR LINES, *Defendant.*

TRANSCRIPT OF PROCEEDINGS

had in the above entitled cause before the HON. JULIUS J. HOFFMAN, one of the Senior Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Monday, September 18, 1978, at the hour of 10:00 o'clock a.m.

Appearances:

Messrs. Glazer & Vance
170 W. Washington Street, Room 1125
Chicago, Illinois 60602

By: Ms. Susan Margaret Vance, appeared on behalf of the plaintiff;

Messrs. Schiff, Hardin & Waite
233 South Wacker Drive
Chicago, Illinois 60606

By: Mr. F. Allan Kovar, appeared on behalf of the defendant.

[2] The Clerk: 77 C 95 Rosemary August v. Delta Airlines, Incorporated, motion for hearing and decision on defendant's pending motion for costs pursuant to Rule 68.

Mr. Kovar: This, your Honor, is also the defendant Delta Air Lines' motion. As you recall there is currently a Rule 68 motion pending before the Court, which has been fully briefed.

And we have here, pursuant to Rule 15(d), requested the Court for a determination on this because of the pending appeal and because of the imminence of that appeal. As noted, the appellant's brief is due on the 29th of this month and our brief, of course, is due within thirty days thereafter. We do believe that a determination of the Rule 68 motion is relevant and significant to that appeal.

The Court: You style your motion, "Motion for a hearing and decision on defendant's pending motion for costs pursuant to Rule 68." Did I not see in the advertisement that Delta Air Lines, Incorporated, next to United, was the most solvent and most prosperous airline in the country and you are concerned about—

Mr. Kovar: I certainly hope so, your Honor.

The Court: And you want to hurry me into this decision on a small matter like this.

Mr. Kovar: No. We are most appreciative, your Honor, [3] of your own heavy schedule. The only reason we filed this motion was because of the pendency of the appeal and we believed the relevancy of this decision and the importance of it possibly to the appellate court.

The Court: Do you want to say anything?

Ms. Vance: No, your Honor, the plaintiff has nothing to say at this time.

The Court: There is now outstanding in this case a motion by the defendant Delta Air Lines for its costs of litigation. By the instant motion the defendant now seeks a ruling on that motion.

In its memorandum of decision in this case, the Court exercised its discretion under Rule 54(d) of the Federal Rules of Civil Procedure and ordered each party to bear its own costs of litigation. By the instant motion the defendant Delta Air Lines now moves, pursuant to Rule 68 of the Federal Rules of Civil Procedure, for an order directing the plaintiff to reimburse it for all costs incurred by Delta since May 12, 1977.

In support of this motion, the movant submits with the motion a copy of the offer of judgment made by Delta to the plaintiff on May 12, 1977. By that offer Delta offered to pay her $4,150.00 in full settlement of this litigation.

[1] Under Rule 68 of the Federal Rules of Civil Procedure at any time more than ten days before the trial begins a party defending against the claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or the effect specified in his offer with costs then accrued. An offer not accepted is deemed withdrawn and evidence thereof is not admissible, except in a proceeding to determine costs.

If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.

The threshold question that must be resolved is whether a Rule 68 motion is proper in the face of an order by the Court pursuant to Rule 54(d) that each party must bear its own costs of litigation. This Court need spend but little time on that issue as it has already been fully considered and resolved in the recent case of Mr. Hanger, Incorporated v. Cut Rate Plastic Hangers, Incorporated, 63 FRD 607, (E. D. of N. Y. 1974).

There the Court held, and this Court must agree, that a party may recover its litigation costs under Rule 68, even though the Court has previously denied costs pursuant to Rule 54(d). In so concluding the Court does not, however, determine that the defendant Delta Air Lines is now entitled to recover its costs of

litigation pursuant to Rule 68 of the Federal Rules of Civil Procedure.

[3] While there is little authority on the point, this Court is satisfied that in order to be effective, a Rule 68 offer must be made in a good faith attempt to settle the parties' litigation and, thus, must be at least arguably reasonable.

The very purposes of Rule 68 of the Federal Rules of Civil Procedure, as well as the few authorities which have addressed the issue of this application, mandate this conclusion as stated in the Advisory Committee's Note to Rule 68, the purpose of this rule is "to encourage settlements and avoid protracted litigation." Or as stated in Staffend v. Lake Central Airlines, Inc., 47 F. R. D. 218 (N. D. Ohio 1969), "Rule 68 is intended to encourage early settlements of litigation. It is also intended to protect the party who is willing to settle from the burden of costs which subsequently accrue." 47 F. R. D. at Page 219.

If the purpose of the rule is to encourage settlement, it is impossible for this Court to concede that this purpose can be furthered or aided by an offer that is not at least arguably reasonable.

The few cases which have addressed this aspect of Rule 68 support this conclusion. In Perkins v. New Orleans Athletic Club, 429 F. Supp. 661 (E. D. La. 1976), the Court, in deciding a request for attorneys fees, noted that under Rule 68 a [6] defendant "may offer what is really due and put the burden of costs on the plaintiff."

Additionally, in Honea v. Cresent Ford Truck Sales, Incorporated, 394 F. Supp. 201 (E. D. La. 1975) the Court stated that "if a reasonable offer is spurned, Rule 68 of the Federal Rules of Civil Procedure provides a manner in which a party can stop costs from accruing." 394 F. Supp. at Page 202. This requirement that the Rule 68 offer must be reasonable, at least arguably so, would also appear to be supported by Baldwin Cooke Company v. Keith Clark, Incorporated, 73 F. R. D. 564 (N. D. Ill. 1976).

Finally, the Court notes the decision of the United States Custom Court Judge in Mr. Hanger, Incorporated v. Cut Rate Plastic Hangers, Incorporated, 63 F. R. D. 607, (E. D. N. Y. 1974). In that case in awarding costs pursuant to a Rule 68 offer, Judge Reed rejected arguments that the offer there involved was "a sham." He also found that it was not made "in bad faith." Instead he concluded the offer was a "proper offer."

By the motion now before this Court, the Court must now decide whether in the specific facts and circumstances of this case the defendant's offer of May 12, 1977 in the sum of $450 sufficiently satisfied Rule 68 of the Federal Rules of Civil Procedure to warrant the [7] entry of the order now sought.

In the opinion of the Court it did not. For this reason the motion made pursuant to Rule 68 will be denied. At the time this offer of $450 was made this litigation was approximately four months old. While the offer was intended to be received in full settlement of the parties' dispute, it is unlikely that such a small sum of money would even have fully satisfied the plaintiff's then incurred costs in attorneys fees.

It must also be remembered that the plaintiff was given some encouragement as to the merit of her claim from the findings of the Equal Employment Opportunity Commission. Additionally, a successful litigant in a Title VII case is as a general rule entitled, not only to reinstatement, but also to back pay plus costs and attorneys fees.

Finally, while the Court did ultimately find itself constrained to enter its judgment for the defendant, the Court certainly did not find the plaintiff's claim to be wholly specious. In the opinion of this Court and in the particular facts and circumstances of this case, an offer of only the sum of $450 could only have been effective were the plaintiff's claim totally lacking in merit or were there present additional factors which would mitigate in favor of the defendant.

[8] For the reasons I have stated, the Court concludes that the defendant's Rule 68 offer of May 12, 1977 did not constitute an effective offer under that rule ... offer of settlement under that rule. For that reason, Mr. Clerk, the motion of the defendant Delta Air Lines, Incorporated for costs pursuant to Rule 68 of the Federal Rules of Civil Procedure will be denied. As previously ordered each party to this action will bear its own costs of litigation.

Mr. Kovar: Thank you, your Honor.

Ms. Vance: Thank you, your Honor.

* * * *

[9] IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

ROSEMARY AUGUST, *Plaintiff,* vs. DELTA AIR LINES, *Defendant.*	Civil Action No. 77 C 95

CERTIFICATE

I, Joan M. Unzicker, do hereby certify that the foregoing is a true, accurate, and complete transcript of the proceedings had in the above entitled cause before the Hon. Julius J. Hoffman, one of the Judges of said Court, in his courtroom at Chicago, Illinois, on September 18, 1978.

/s/ JOAN M. UNZICKER
Official Court Reporter
United States District Court
Northern District of Illinois

United States District Court
Northern District of Illinois
Eastern Division

Name of Presiding Judge: Honorable Julius J. Hoffman

Cause No. 77 C 95 Date: September 19, 1979

Title of Cause: Rosemary August v. Delta Air Lines, Inc.

Brief Statement of Motion: Motion for Hearing and Decision on Defendant's Pending Motion for Costs Pursuant to Rule 68

Names and Addresses of moving counsel: J. Allan Lewis, Max G. Brittain, Jr., Schiff Hardin & Waite, 7200 Sears Tower, 233 S. Wacker, Chicago 60606

Representing: Defendant Delta Air Lines

Names and Addresses of other counsel entitled to notice and names of parties they represent: Carol R. Bellows, Bellows & Bellows, The IBM Plaza, Suite 33, Chicago; Susan M. Vance, [illegible] & Vance, 120 W. Washington, Chicago; Plaintiff Rosemary August

Defendant's motion for costs pursuant to Rule 68 is denied.

Hoffman, J.

APPENDIX D

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Unpublished Order Not to be Cited
Per Circuit Rule 35

(Argued February 20, 1979)

July 6, 1979

Before

Hon. Robert A. Sprecher, *Circuit Judge*
Hon. Philip W. Tone, *Circuit Judge*
Hon. Harlington Wood, Jr., *Circuit Judge*

Rosemary August,
Plaintiff-Appellant,

vs.

No. 78-1933

Delta Airlines, Inc.,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 77 C 95

Julius J. Hoffman,
Judge.

ORDER

Rosemary August initiated this Title VII action against defendant Delta Air Lines, Inc. alleging, *inter alia*, that she was discharged from her position as flight attendant solely because she was black. August sought reinstatement, back pay, benefits, other equitable relief and attorneys' fees and costs pursuant to

Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.* After a bench trial the district court entered judgment in favor of the defendant. The plaintiff has appealed on the ground that the decision was unsupported by the evidence and that the district court improperly applied the law.[1] We affirm and add only a few observations to supplement the trial court's memorandum of decision and order entered on June 9, 1978.

Plaintiff offered some proof which suggested that she may have been subject to discrimination, but the evidence was superficial, incomplete, inadequate or otherwise defective. The evidence failed to establish that she was treated differently than similarly situated whites. The evidence from which it appeared that blacks on occasion may have received some preferential treatment was inconclusive in the absence of the complete files pertaining to the allegedly preferred employees and others similarly situated. The plaintiff, who had the burden of proving discrimination, selected only isolated instances for comparison of treatment. Complete personnel records of other flight attendants were not produced to help establish a basis for meaningful comparison of those employees similarly situated. *See Turner* v. *Texas Instruments, Inc.*, 555 F. 2d 1251, 1257 (5th Cir. 1977). The statistical evidence was incomplete and based only upon limited samples, which may or may not have truly reflected what they purported to show.[2] *See generally Mayor of Philadelphia* v. *Educational Equality League*, 415 U. S. 605, 620 (1974).

Regardless of the deficiencies of the plaintiff's evidence, the defendant strongly defended the action with a non-discriminatory

1. In conjunction with this order, an opinion has been published this date affirming the trial court's disposition of the Rule 68 offer of judgment issue in plaintiff's favor.

2. The Equal Employment Opportunity Commission interpretative manual, § 132.5(e), makes the elementary point that comparative evidence must be complete and relate to a sufficiently large sample of similarly situated Negroes and Caucasians so as to provide a meaningful basis for drawing a comparison.

explanation.[3] As a result of the charge of her fourth no show on December 16, 1974, the plaintiff was placed on indefinite suspension in accordance with the rules of Delta Air Lines. On January 2, 1975, the regional manager for Delta reviewed the plaintiff's file and informed her that she was on "last chance status" saying:

> Contents within your file revealed innumerable discrepancies ranging from no-shows, poor conduct while pass riding, lateness, co-worker write-ups and passenger complaints.
>
> Actions such as you've demonstrated will no longer be tolerated. You have been adequately warned and previously disciplined because of your continuing unsatisfactory job performance. By copy of this letter you are notified that this is your final warning and any future infraction will result in the termination of your employment with Delta Air Lines.

3. The following is a brief summary of the plaintiff's infractions while working with Delta Air Lines:

7/ 8/72	No show	4/30/74	Co-worker complaint
7/19/72	Co-worker complaint	5/ 5/74	Passenger complaint
7/21/72	No show	5/15/74	Discrepancy report
8/22/72	No show	6/ 7/74	Co-worker complaint
9/ 1/72	Co-worker complaint	6/21/74	Discrepancy report
9/16/72	No show	10/ 3/74	Discrepancy report
10/ 4/72	Discrepancy report	10/28/74	No show
10/ 8/72	Discrepancy report	11/19/74	Co-worker complaint
10/16/72	Two passenger complaints	11/24/74	Discrepancy report
		11/30/74	Co-worker complaint
12/ 72	Co-worker complaint	12/ 5/74	Discrepancy report
2/ 2/73	No show	12/16/74	No show
4/11/73	Discrepancy report	1/11/75	Passenger complaint
6/21/73	Discrepancy report	8/ 1/75	Co-worker complaint
7/17/73	Discrepancy report	8/11/75	Co-worker complaint
2/ 5/74	Discrepancy report	8/26/75	Discrepancy report
2/28/74	No show		

After the November 30, 1974, co-worker complaint about the plaintiff's lateness in boarding the plane, the plaintiff, for her third

(Footnote continued on next page.)

After that notification, another passenger complained about the plaintiff's service; two co-workers complained about her unprofessional conduct; and other discrepancy report for tardiness was lodged against her. On August 27, 1973 the plaintiff was asked to resign, and on September 3, 1973 was fired. The record supports considerable company forbearance without regard to the employee's race. Nonetheless, we do not view this case as frivolous.

We find no violation of the Title VII requirements. *Board of Trustees of Keene State College v. Sweeney*, U.S. (1978); *Furnco Construction Co. v. Waters*, 438 U.S. 567 (1978); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Affirmed.

(Footnote continued from preceding page.)

[illegible] in 60 days, was suspended for two days. Following the suspension of the supervisor, the plaintiff wrote separate letters to her supervisor and base manager apologizing for her lack of professionalism. The plaintiff also told her supervisor, "Getting suspended is exactly what I deserved[.] no one brought this upon myself but me. The only grateful I was suspended for 2 days and not three."

APPENDIX F.

In the United States District Court
For the Northern District of Illinois

ROSEMARY AUGUST, *Plaintiff*		
vs.		No. 77 C 95
DELTA AIR LINES, INC., *Defendant*		

MEMORANDUM OF DECISION AND ORDER

Bernard M. Decker, Senior United States District Judge. This is an action by the plaintiff Rosemary August to recover against her former employer, defendant Delta Air Lines, Inc. The plaintiff's complaint, as originally filed, was in two counts. In Count I, she seeks redress for employment discrimination allegedly practiced by Delta Air Lines. It is her position that in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, Delta subjected her to "... terms and conditions of employment different from those of her similarly situated Caucasian co-workers ..." and ultimately discharged her because she is a Negro. As relief, the plaintiff prays for reinstatement, back pay and such other equitable relief as may be proper. She also seeks an award of attorneys' fees and costs. These forms of recovery are expressly provided for in the Act. See 42 U.S.C. § 2000e-5.

Count II of the complaint was brought pursuant to the court's pendent jurisdiction. In that count, the plaintiff alleged that subsequent to her discharge by defendant, she sought employment with several companies, but "... has not been hired de-

spite her proud qualifications. Pleading further, the plaintiff states that she therefore believes that defendant has maliciously caused to be published to prospective employers libelous, slanderous, and defamatory statements concerning the plaintiff and having the effect of preventing her employment. For this alleged defamation, the plaintiff sought actual and punitive damages totalling $150,000.

In its answer, Delta denied all substantive allegations in the plaintiff's complaint. Delta also filed a motion for summary judgment as to Count II, arguing that there was no evidence to support the plaintiff's belief that she was being defamed. In support, deposition testimony from the plaintiff and the affidavit of one F. Kendall Allen, a Delta employee, were presented. The plaintiff admitted in her deposition that she was unable to cite any facts to support her belief she was being defamed. The affiant stated that no prospective employer inquiries regarding Rosemary August had ever been received by Delta. The plaintiff elected not to oppose the motion for summary judgment, and it was granted by the court. This case therefore proceeded to trial only on the plaintiff's allegations of race discrimination in violation of Title VII.

For cases for this court to have subject matter jurisdiction in this case certain procedural prerequisites must have been satisfied. These requirements are detailed in § 706 of the Act, 42 U.S.C. § 2000e-5. That section provides:

> In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under this section by the Commission before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, [42 U.S.C. § 2000e-5(c)]

More importantly, under subpart (e) of § 706:

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency, such charge shall be filed within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier. [42 U.S.C. § 2000e-5(e)]

The purpose of the State agency filing requirement is to give available State agencies a prior opportunity to consider discrimination complaints. Compliance with this requirement is critical. *Love v. Pullman Co.*, 404 U.S. 522, at 524 and 526 (1972). In fact, because these requirements are jurisdictional, the plaintiff has the burden of establishing them by a preponderance of the evidence. A failure to do so will leave the court without subject matter jurisdiction. *Cutliff v. Greyhound Lines, Inc.*, 558 F. 2d 803, at 806 (5th Cir. 1977), *Reese v. Lafourche Gardens Co.*, 548 F. 2d 211, at 212 (7th Cir. 1977), *Ilchire v. Chicago and Eastern Illinois Railroad Co.*, 332 F. Supp. 601 (N.D. Ill. 1972).

At the trial of this cause, Rosemary August presented evidence of compliance with the procedural requirements of § 706. In its post trial brief, the defendant argued that the plaintiff had not sustained her burden of proof on this issue, and that this court therefore was without subject matter jurisdiction herein. In response to that argument, the plaintiff filed a motion by which she petitioned the court to "... reopen the proofs for the limited purpose of further establishing that all jurisdictional requirements ... have been met by plaintiff."

That motion was granted, and a special supplementary proceeding was held for the limited purpose of accepting additional evidence on the jurisdictional issue.

From all the evidence presented, the court finds that because the plaintiff has sustained her burden of establishing compliance with the procedural requirements of § 706 by a preponderance of the evidence, this court does have the requisite subject matter jurisdiction to decide the merits of this litigation. Rosemary August was employed as a flight attendant for Delta Air Lines, Inc. commencing November 22, 1971. Her employment was terminated on or about August 27, 1975. On April 7, 1975, and again on August 28, 1975, she filed charges of unfair employment practices against Delta with the Chicago District Office of the Equal Employment Opportunities Commission. On April 11, 1975, and again on August 29, 1975, the Commission deferred her charges to the Illinois Fair Employment Practices Commission, which is the State agency with authority to address her complaint. From the evidence adduced, the only reasonable conclusion to be reached is that the Fair Employment Practices Commission elected to take no action on Miss August's complaint. Therefore, acting pursuant to its statutory authority, the Equal Employment Opportunities Commission assumed jurisdiction over this matter. On January 4, 1977, it issued its Notice of Right to Sue. The plaintiff then filed her complaint with this court on January 11, 1977.

From these facts it is clear that the time requirements of § 706 have been satisfied. More importantly, this procedure by which the plaintiff filed her charges with the Equal Employment Opportunities Commission, which Commission then deferred those charges to the Illinois Fair Employment Practices Commission for its prior consideration, does comply with the State agency filing requirement of § 706. *Love* v. *Pullman Co.*, 404 U. S. 522 (1972). Therefore, all procedural requirements of Title VII have been satisfied. This court does have jurisdiction to decide the merits of this action.

In Count I of her complaint, Miss August has alleged that she was subjected to employment discrimination on the basis of her Negro race. A number of cases have addressed the proof requirements in private, non-class actions challenging employment discrimination. In the leading case of *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973), the Supreme Court was confronted with a situation where the complainant in a Title VII case alleged that his discharge and the general hiring practices of his former employer were racially motivated. In that case, the Court held that the initial burden of establishing a prima facie case of racial discrimination may be satisfied by a showing (i) that the plaintiff belongs to a racial minority; (ii) that he applied for and was qualified for a job for which the employer was seeking applicants; (ii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applications from persons of equal qualifications. Assuming this burden of proof is discharged, the burden then shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the individual's rejection. If that is done, the plaintiff then has the additional burden of proving the stated reason was just a pretext for a racially discriminatory decision. *Accord, Flowers* v. *Crouch-Walker Corp.*, 552 F. 2d 1277, at 1281 (7th Cir. 1977); *Kinsey* v. *First Regional Securities, Inc.*, 557 F. 2d 830, at 836 (D. C. Cir. 1977); *Sime* v. *Trustees of California State University and Colleges*, 526 F. 2d 1112 at 1114 (9th Cir. 1975).

While the Court in *McDonnell Douglas Corp.* v. *Green* presented this as one acceptable articulation of the specific elements necessary to establish a prima facie case, it specifically pointed out that the facts will vary in Title VII cases, so that its statement of the prima facie proof required should not be considered ". . . necessarily applicable in every respect to differing factual situations." *Id.*, at page 802, n. 13. The Court again addressed this point in *International Brotherhood of Teamsters*

v. *United States*, 431 U.S. 324 (1977), where it gave a more complete statement of the proposition:

> The importance of McDonnell Douglas lies not in its specification of the discrete elements of proof there required, but in its recognition of the general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on discriminatory criterion illegal under the Act. 431 U.S. at 358.

See also, McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, at 279, n. 6 (1976).

While this court does find the approach articulated in *McDonnell Douglas Corp. v. Green* to be instructive, it must conclude that the evidence presented here does not lend itself to the application thereof. But regardless of the approach adopted, what a plaintiff must establish as a minimum in a Title VII case is that he/she is a member of a protected class and that he/she was subjected to disparate treatment which was "racially premised." *International Brotherhood of Teamsters v. United States*, 431 U.S. at 335; *see also, Barnes v. St. Catherine's Hospital*, 563 F.2d 324 (7th Cir. 1977). These facts must be established by a preponderance of the net of all the evidence. *Barnes v. St. Catherine's Hospital, supra; Henry v. Ford Motor Company*, 553 F.2d 46 (8th Cir. 1977). In other words, in order to prevail, as a minimum, Rosemary August must establish by a preponderance of all the evidence that because she is a Negro, she was subjected to employment standards that were different from those imposed on similarly situated Caucasian flight attendants so that she was terminated while similarly situated Caucasian flight attendants were not. Viewing the evidence presented in this case against these requirements the court has no difficulty in reaching its decision.

1. This is not to say that a showing of a discriminatory *purpose* is required in Title VII cases. It is clear that there is no such requirement. *Washington v. Davis*, 426 U.S. 248 (1976); *United States v. City of Chicago*, No. 77-1171 (7th Cir. February 21, 1978).

Rosemary August is 27 years old; she is a member of the Negro race. She applied for a position as a flight attendant with Delta Air Lines by sending her employment application to their corporate offices in Atlanta, Georgia in October of 1971. Following an interview on November 3, 1971, the plaintiff was employed as a flight attendant and, after an initial training period, she was assigned to Delta's base at O'Hare International Airport in Chicago, Illinois. She worked as a flight attendant for Delta until her termination on August 27, 1975.

Delta Air Lines, Inc. is a national airline with its headquarters in Atlanta. It operates various bases throughout the country. The O'Hare base has a Base Manager who is in charge of all Delta flight attendants assigned to that base. Reporting directly to the Base Manager are supervisors. Each supervisor is charged with primary responsibility for a certain number of flight attendants.

From 1971 through October of 1973, the Base Manager at O'Hare Airport was June Kulencamp. Commencing in October of 1973, Nancy Severtsen filled that position. Throughout the period of Miss August's employment her immediate supervisor was Carolyn Powers.

These positions are important both because they are positions of authority and because responsibility for flight attendants' employment files is vested in the Base Manager and supervisors. The importance of this later factor lies in the fact that Delta employment decisions such as advancement, discipline and termination are, to a large extent, made based on what is contained in the flight attendant's file.

A termination decision at Delta normally requires first a determination by the supervisor and Base Manager that a flight attendant has failed to satisfy Delta standards for continued employment. Next, the employee file and a recommendation for termination are sent to the defendant's corporate headquarters

in Atlanta where they are reviewed by various management personnel. These people include a member of the defendant's staff of in house counsel, defendant's Equal Employment Manager, and the corporate Vice President in charge of personnel. On their concurrence, a Delta flight attendant is terminated.

In the case of Rosemary August these steps were carried out. After Nancy Severtsen and Carolyn Powers decided to recommend her termination, Miss August's records were transmitted to Atlanta. There, they were reviewed by Peter Caldwell, Administrative Assistant Personnel, Hunter Hughes, one of the defendant's in house counsel, Richard Ealey, Equal Employment Manager, and R. W. Allen, Vice President Personnel Benefits. Each of these individuals agreed with the original recommendation, and Rosemary August was terminated.

The decision to terminate was based on a determination of "poor job performance and attitude". The supervisory personnel involved based this conclusion on their findings that Rosemary August had committed a number of "no-shows" (failures to report for an assignment on time or other equally serious misconduct), that numerous co-worker and passenger complaints had been filed against her, that she was not properly performing her job and that she had been guilty of various Delta policy infractions.

The plaintiff has taken the position that Delta Air Lines' base at O'Hare International Airport had, between 1971 and 1978, a policy or practice of subjecting Negro flight attendants to discriminatory treatment, and that she was the victim of this discrimination. She argues that in the case of Negro employees in general and herself in particular, in making entries into flight attendant's files and in reaching employment decisions, the defendant held Negro attendants to higher or stricter standards than Caucasians. As the court has previously noted, entries in flight attendants' employment files are critical to the defendant's employment decisions. Therefore, a showing that the defendant was guilty of disparate treatment regarding file compilations would be highly probative of a Title VII violation.

In support of her allegations of disparate treatment, the plaintiff chose not to present for comparison the full employment files of Rosemary August and similarly situated Caucasian flight attendants. As will be more fully developed, she also elected to make only limited use of statistical data. Instead, her approach was primarily to present evidence to demonstrate that on particular occasions Caucasian flight attendants were treated a certain way while in similar situations either Rosemary August or one of Delta's other Negro flight attendants was dealt with more harshly.

The record presented in this case does establish that Rosemary August did perform her job on various flights in what one individual described as a "top notch" manner. During her career with Delta, she received a number of complimentary letters from passengers, which letters were placed in her file. She was also formally complimented by co-workers on occasion; those compliments were also made a part of her file. More importantly, she also received one Customer Service Award and two Feather-In-Your-Cap Awards. These are awards issued by Delta's corporate office for outstanding service by an employee. They are awarded to a flight attendant who has conducted himself or herself on a flight, or has in some other manner performed his or her duties in an exemplary manner. The Customer Service Award includes Delta Air Lines, Inc. stock certificates, recognition in the Delta Digest, a company newsletter, and a letter of appreciation from the Chairman of Delta's Board of Directors.

However, the record also contains evidence that establishes Mis August was capable of poor or unacceptable performance. Her file contains four "no show" citations; it is Delta's established policy that an employee may be subject to dismissal for four such infractions. Her file also contains a number of co-

worker and supervisor complaints. Co-workers found that the plaintiff could be offensive in her manner and uncooperative. Additionally, a number of letters of criticism were received from passengers. The plaintiff defendant against these complaints by claiming they were not factually correct. She also argued they were not adequately investigated by Delta. The court cannot respect failures to investigate complaints. Nevertheless, the complaints were filed, and they were received from a number of sources.

From all of this evidence, the court concludes that Rosemary August was capable of quality work performance, but was also guilty of carrying out her duties in a manner that was unacceptable to her employer. However, this is not the issue now before the court. What this court must now decide is whether the plaintiff has established by a preponderance of the evidence that two standards of performance were applied at Delta's O'Hare August base, and that Rosemary August, as a Negro, was a victim of this double standard. After a thorough review of the record in this case, the court must conclude that this burden has not been met.

The most probing evidence of disparate treatment presented in this case was a showing that in the period from 1972 through 1975, of a total of 38 flight attendants terminated, 10 (or 26%) were Negroes. And when the period is extended through 1976, 13 out of 38 (or 34%) were Negroes. Delta maintains a total staff of approximately 500 flight attendants at its O'Hare base. From the available evidence, approximately one fifth of that total, or approximately 100 of Delta's flight attendants, are Negroes.

The defendant has argued that where the statistical sample is small as it admittedly is the case here, the results obtained should be viewed as meaningless. In support, it cites, *inter alia*, *Mayor of Philadelphia* v. *Educational Equality League*, 415 U.S. 605, (1974); *Robinson* v. *City of Dallas*, 514 F. 2d 1271 (5th Cir. 1975); *Morita* v. *Southern California Permanente Medical Group*, 541 F. 2d 217 (9th Cir. 1976); *Ochoa* v. *Monsanto*, 473 F. 2d 318 (5th Cir. 1973). With this argument, the court does not agree.

In the recent Supreme Court case of *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977), the Court did caution that "(c)onsiderations such as a small sample size may, of course, detract from the value of such evidence, [citing *Mayor of Philadelphia* v. *Education Equality League*, 415 U.S. 605, at 620-621 (1974)]. . . ." However, in that case the Court also noted that with proper caution, they can be of assistance to the fact finder in reaching his decision. See *International Brotherhood of Teamsters* v. *United States*, 431 U.S. at 339-340. Other cases are in accord; *see e.g.*, *Burns* v. *Thiokol Chemical Corporation*, 483 F. 2d 300, at 305-307 (5th Cir. 1973); *Equal Employment Opportunity Commission* v. *Eagle Iron Works*, 424 F. Supp. 240 (S.D. Ia. 1976).[2]

While these statistics do constitute evidence of disparate treatment because of the small numbers of employees involved relative to Delta's employment population, they cannot constitute conclusive proof thereof. See *International Brotherhood of Teamsters* v. *United States*, *supra*, and other cases previously cited herein. Rather, they must be considered along with all of the evidence in deciding this case.

As the court has previously stated, the main thrust of the plaintiff's case was a showing that in numerous specific situations Delta's supervisory personnel dealt more harshly with Negroes, both as to the disciplinary action taken and as to the

2. In reaching this decision to give weight to this statistical evidence presented by the plaintiff, the court has determined that it must reject plaintiff's argument that the proper measuring period is only 1975, the year she was terminated. In that year, 6 of 8 terminations involved Negroes. Clearly, 1975 cannot stand alone because the sample is too small, the measuring period is too short to be meaningful, and the results obtained are misleading.

entries made to the employees' files, than Caucasians. A review of every such incident is not practicable, and the court will not now attempt to do so.

However, one incident involving the plaintiff is sufficiently offensive to this court that individual recognition must be given to it. Based on little more than rumors or gossip, in April of 1973 defendant's then Base Manager, June Kulenkamp, determined to have Rosemary August examined for a venereal disease. Not only was the plaintiff not given any chance to confront the sources of Kulenkamp's information, she was not even told why she must submit to the medical examination until after the tests proved negative. In the interim, she was left to speculate on the need for this immediate physical examination. While the court believes the embarrassment and anxiety caused Rosemary August in this incident were unnecessary and the result of improper handling of the situation, it cannot find a racial motive therefor in the record. There simply was no showing that any other flight attendant, Negro or Caucasian, was subjected to treatment even remotely similar thereto.

By the remainder of her evidence, the plaintiff presented numerous other incidents where one employee, a Negro, was dealt with severely while in similar situations lesser measures were taken against Caucasian flight attendants. These included showings that Negroes were given "no shows", suspensions, and "discrepancy reports" (on the order of a warning notice) where in like cases, Caucasians were dealt with more tolerantly. However, both by its own evidence and during cross examination, the defendant established that on an equal number of occasions, Delta personnel showed favoritism to Negroes.

For example, the plaintiff established that for infractions such as tardiness, missing Delta training sessions, not being within ready telephonic reach while on reserve duty, substandard work performance, substandard service to passengers, offensive disposition, missing scheduled uniform and weight checks, and for

various other infractions, stern measures were taken against Negroes in general and Rosemary August in particular, while a more tolerant attitude was displayed toward Caucasians. Additionally, the plaintiff demonstrated that in certain cases, the benefit of any doubt was shown a Caucasian flight attendant but not a Negro. Finally, certain Caucasian flight attendants who were in jeopardy of losing their jobs were given more warnings and "last chances" than certain Negro attendants.

Standing unrebutted, this evidence would raise the necessary inference of racial bias. However, the evidence establishes that in equal numbers of cases, it was the Negro that benefited from a benevolent supervisor. Negroes were given discrepancy reports (warnings) instead of "no shows", or were excused from any discipline where in similar situations Caucasians were dealt with severely.

Rosemary August's own employment history includes such incidents. While her file contains four "no shows", it was established that she was properly subject to citation on at least three additional occasions. At other times, she received only verbal reprimands or was excused from any discipline when her conduct could under Delta policy have resulted in the imposition of stronger sanctions.

In reaching its conclusion in this case, the court must note certain discrepancies in the testimony. It is established Delta policy that an applicant disclose any prior employment within the airline industry. Rosemary August had previously been employed by United Airlines, Inc. when she applied for the position of flight attendant with Delta Air Lines. Her employment application fails to disclose this fact. While Miss August testified that she orally disclosed this experience during her job interview but was told "not to worry about it", the interviewer involved, Kendall Allen, denied this. Allen also testified, and it appears reasonable to conclude, that prior airline experience is an important element in evaluating a job applicant. Miss August also testified that in her opinion she had performed her duties

as a flight attendant in an acceptable manner and was not adequately apprised of dissatisfaction harbored by her supervisors. However, it was shown that in December of 1974, following a series of events culminating in a two day suspension, Rosemary August sent letters of apology to both Base Manager Severtsen and her immediate supervisor, Carolyn Powers, in which she acknowledged that she may have been guilty of substandard work performance and would endeavor to correct the situation. As is its duty, the court has taken these factors into account in determining the weight to be given to the evidence presented by the parties in this lawsuit.

From the evidence presented, it would appear that Delta Air Lines, Inc. may not be the most pleasant place to work. However, this trial record does not establish that its employment practices are racially premised. It further does not support the conclusion Rosemary August was subjected to disparate treatment, either in her employment or termination, because of the fact she is a Negro. For this reason, this court has concluded that it must enter its judgment in this case in favor of the defendant.

Accordingly, this case will be, and the same hereby now is dismissed with prejudice in favor of the defendant Delta Air Lines, Inc. and against the plaintiff Rosemary August. Each party will bear its own costs of litigation. No award of attorney's fees will be made in favor of either party.

This Memorandum of Decision and Order is intended to satisfy the provisions of Rule 52(a) of the Federal Rules of Civil Procedure which require the court to set forth its findings of fact and conclusions of law in all cases tried by the court sitting without a jury.

Dated at Chicago, Illinois, this 9th day of June, 1978.

APPENDIX F.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

ROSEMARY AUGUST, *Plaintiff,*	}	
vs.	}	No. 77 C 95
DELTA AIR LINES, INC., *Defendant*	}	

PROOF OF SERVICE OF OFFER OF JUDGMENT

County of Cook } ss
State of Illinois }

Max C. Brittain, Jr., being duly sworn, deposes and says:

1. I am attorney for the defendant in this action.

2. On May 12, 1977, Delta Air Lines, Inc., the defendant in this action, served upon plaintiff's attorney the annexed offer of judgment.

Max G. Brittain, Jr.,
One of the Attorneys for
Defendant Delta Air Lines, Inc.

Dated:

Notary Public

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

ROSEMARY AUGUST,
Plaintiff,
vs.
DELTA AIR LINES, INC.,
Defendant

No. 77 C 95

OFFER OF JUDGMENT

To: Carole K. Bellows
Bellows & Bellows
One IBM Plaza, Suite 1414
Chicago, Illinois 60611

Pursuant to Rule 68 of the Federal Rules of Civil Procedure, defendant hereby offers to allow judgment to be taken against it in this action, in the amount of $450 which shall include attorney's fees, together with costs accrued to date. This offer of judgment is made for the purposes specified in Rule 68, and is not to be construed either as an admission that the defendant is liable in this action, or that the plaintiff has suffered any damage.

Of Counsel:
Schiff Hardin & Waite
7200 Sears Tower
233 South Wacker Drive
Chicago, Illinois 60606
876-1000

Max G. Brittain, Jr.,
One of the Attorneys for
Defendant Delta Air Lines, Inc.

Sidney P. Davis
Hunter R. Hughes
Delta Air Lines, Inc.
Hartsfield Atlanta International Airport
Atlanta, Georgia 30320

APPENDIX G.

Original Rule 68, eff. September 16, 1938

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. If the offer is not so accepted it shall be deemed withdrawn and evidence thereof is not admissible. If the adverse party fails to obtain a judgment more favorable than that offered, he shall not recover costs in the district court from the time of the offer but shall pay costs from that time.

As amended, eff. March 19, 1948

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.

The fact that an offer is made but not accepted does not preclude a subsequent offer.

As amended, eff. July 1, 1966

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment. but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.